No. 11217

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. F. LYTLE CO., an Iowa corporation, GREEN CONSTRUCTION CO., an Iowa corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation,

Appellants,

vs.

C. M. WHIPPLE, Deputy United States Compensation Commissioner for the Fourteenth Compensation District, et al,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE C. M. WHIPPLE

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STATEMENT OF THE CASE

While the bare facts alleged at the opening of appellants' statement of the case might create the impression that William Earnest Nutt, for whose death a claim of compensation was filed pursuant to statute, was at the time of his accidental death en-

gaged in a truck ride, not incidental to his employment, nevertheless this appellee does not desire to controvert any implication thereby created because he believes it unnecessary as the facts upon which appellants specify error seem sufficiently clear and such implication is not advanced by their argument.

QUESTIONS PRESENTED BY THE APPEAL

Is there sufficient evidence in the record, upon which the compensation award and order affirming same are based, to support the findings of the deputy commissioner (a) that the death of William Earnest Nutt arose out of and in the course of his employment, and (b) that the death of the deceased was not occasioned solely by his intoxication?

PERTINENT STATUTES

The pertinent portions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U.S.C.A. 901 et seq), made applicable to persons employed at certain defense bases and under certain Public Works Contracts by the Act of August 16, 1941, as amended (55 Stat. 622, 42 U.S.C.A. 1651-1654), insofar as applicable to this appeal are as follows:

"Sec. 902—DEFINITIONS. WHEN USED IN THIS CHAPTER * * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment. * * *"

"Sec. 903. COVERAGE. * * *

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

"Sec. 904. LIABILITY FOR COMPENSATION. * * *

(b) Compensation shall be payable irrespective of fault as a cause for the injury."

"Sec. 919. PROCEDURE IN RESPECT OF CLAIMS. * * *

(a) * * *, the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claims."

"Sec. 920. PRESUMPTIONS. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter. * * *

(c) That the injury was not occasioned solely by the intoxication of the injured employee. * *"

"Sec. 921. REVIEW OF COMPENSATION ORDERS. * * *

(b) If not in accordance with law, a compensa-

tion order may be suspended or set aside, in whole or in part, through injunction proceedings * * * instituted in the Federal district court * * *."

ARGUMENT

A. THE COMPENSATION LAW.

1. Policy and Purpose.

The law recognizes the human element involved in the employment of labor. As was said in *Hartford Accident & Indemnity Co. v. Cardillo* (App. D.C. 1940), 112 F. (2d) 11, certiorari denied, 310 U.S. 649, at page 15 of the Federal Reporter:

> "The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. The extension to their accidental (i.e., nonculpable, but injurious) behavior was not difficult. So with that of strangers, including assault by deranged persons, and their negligence intruding into the working environment. But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and cama-

raderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. 'Old Man River' is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment. (And at page 17):

* * *

"(11) The limitation, of course, is that the accumlated pressures must be attributable in substantial part to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating entirely outside the working relation and not substantially magnified by it. Whether such influences have annulling effect upon those of the environment ordinarily is the crucial issue. The difference generally is as to the applicable standard. It is not, as is frequently assumed, the law of 'independent, intervening agency' applied in tort cases. It cannot be prescribed in meticulous detail, but is set forth in the statute, not only in the broad presumptions created in favor of compensability, but more explicitly in the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by the claimant. The provision is: 'No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee or by the *willful intention of the employee to injure or kill himself or another.*' (Italics supplied)"

Certainly lengthy court actions were not contemplated in the administration of the Act.

> " * * * the purpose of the Act was to expedite the hearing of claims and granting of awards and to simplify as greatly as possible the procedure in such matters, so that the needy, the helpless, and the ignorant would receive financial aid promptly. Tht Act gives to the commissioner broad powers to accomplish this purpose."
>
> *South Chicago Coal & Dock Co. vs. Bassett,* (C.C.A. 7, 1939), 104 F. (2d) 522, 526, affirmed 309 U.S. 251.

2. Rules of Construction.

It has been generally held that the compensation law is a "remedial statute" in the public interest and should be liberally construed so that the purpose of its enactment by Congress for relief of an injured employee or his dependent family may be effected and that any doubt should be resolved in their favor, if possible, so as to avoid incongruous or harsh results.

See *Hartford Accident & Indemnity Co. v. Cardillo, supra; Baltimore & Philadelphia Steamboat Co. v. Norton,* 284 U.S. 408, 414.

3. Review by Court Within Statutory Limitations.

(a) Scope

The rights, remedies and procedure under the

Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the court are those only which are expressly conferred by the Act.

> *Associated Indemity Corp. v. Marshall,* (C.C.A. 9, 1934), 71 F. (2d) 235.

It is solely within the province of the deputy commissioner to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability, and the Act does not contemplate hearing *de novo* before the court as to facts. *Wilson & Co. v. Locke* (C.C.A. 2, 1931), 50 F. (2d) 81.

The scope of review seems now further settled by the Supreme Court in *Norton v. Warner Co.*, 321 U.S. 565, 568, where the court expressed its view:

> "Sec. 19(a) of the Act gives the Deputy Commissioner 'full power and authority to hear and determine all questions in respect of' claims for compensation. And Sec. 21(b) gives the federal district courts power to suspend or set aside, in whole or in part, compensation orders if 'not in accordance with law.' In considering those provisions of the Act in the *Bassett* case, we held that the District Court was not warranted in setting aside such an order because the court would weigh or appraise the evidence differently. The duty of the District Court, we said, was to give

the award effect, 'if there was evidence to support it.' 309 U.S. at 258. And we stated that the findings of the Deputy Commissioner were conclusive even though the evidence permitted conflicting inferences. Id. p. 260. And see *Parker v. Motor Boat Sales*, 314 U.S. 244, 246. This statement of the finality to be accorded findings of the Deputy Commissioner under the Act was not new. It had been stated in substantially similar terms in *Voehl v. Indemnity Insurance Co.*, 288 U.S. 162, 166, and in *Del Vecchio v. Bowers*, 296 U.S. 280, 287. The rule fashioned by these cases followed the design of the Act of encouraging prompt and expeditious adjudication of claims arising under it. By giving a large degree of finality to administrative determinations, contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged. Thus it is that the judicial review conferred by Sec. 21 (b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. The error must be one of law, such as the misconstruction of a term of the Act.

(b) Burden of Proof and Presumptions.

The employer and insurance carrier, on a libel to set aside a compensation order, have the burden of showing that there was not sufficient evidence before the Deputy Commissioner to support the order complained of in the bill. The findings of fact of the Deputy Commissioner are presumed to be correct.

Burley Welding Works v. Lawson (C.C.A. 5, 1944), 141 F. (2d) 964, 966.

B. FINDINGS OF DEPUTY COMMISSIONER SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. That Death of Employee Arose Out of and in Course of Employment.

Taking the foregoing elements in reverse order, attention is called to the testimony of A. A. Lyon, Engineer and Superintendent of the Lytle-Green Construction Company, who testified in part (R. 57-58) as follows:

> Int. 13: What provisions for transportation did his employer provide for transporting William Earnest Nutt and the other workers from the place where they ate and slept to the place where they worked?
>
> A. On a Company truck to the place where they worked.
>
> Int. 14: State generally whether his employer did provide a place for William Earnest Nutt to work and a place for him to stay and a place for him to eat, and transportation back and forth between these different places; and if so, where these different places were all in June, 1942?
>
> A. Yes, all within the area of activity in connection with the construction of the Big Delta Airport.

The testimony of William H. Green, foreman under whom the deceased worked on the day of his death, is to the same effect. (R. 67, 68, 73).

The testimony of Robert L. Nine, fellow-employee, is of similar effect as to the foregoing answers (R. 85, 86), and in addition, he testified:

> Int. 15. On the day William Earnest Nutt was killed, did you go to the place of work where he was working with him, and if so, about what time of day did you go and what method of transportation did you use?
>
> A. Yes, I went with him. We left the camp at 1:00 P. M. by truck.
>
> Int. 16. Did one of your employers' trucks transport you from the camp to the place where that work was done that William Earnest Nutt and you and the others were doing on the afternoon of the day he was killed? A. Yes.
>
> Int. 17 What kind of a day was it in reference to weather and what kind of a road was there between the camp and the place where you and William Earnest Nutt and the others were working?
>
> A. Rainy day and the road was rough.
>
> Int. 18. What were you and William Earnest Nutt and the others with you working at for your employer on the afternoon of the day William Earnest Nutt was killed?
>
> A. We were loading electrical equipment on a barge.

Int. 19. How long did you and William Earnest Nutt work that afternoon or that day?

A. That afternoon we worked about five (5) hours.

Int. 20. What did you and William Earnest Nutt and the others do after your work was completed, and where did you go?

A. It was raining and we got wet so we went to Rika Wallen's roadhouse to dry out.

Int. 21. If you went to Rika's roadhouse, where was that in reference to the place where you and William Earnest Nutt were working, and did William Earnest Nutt also go to the same place?

A. Rika's roadhouse was about 500 feet from where we were working. Mr. Nutt also went there.

Int. 22. About what time of day did you go to that place? A. About 6:00 P. M.

Int. 23. State, if you know, whether or not the foreman over William Earnest Nutt and yourself, Mr. W. B. Green, was an employee of the same employer employing you and William Earnest Nutt on that afternoon, and also state, if you know, what the name of that employer was.

A. Yes, employer of all was Lytle & Green Construction Co.

Int. 24. State, if you know, whether William Earnest Nutt was instructed by W. B. Green as to how he was to return to the camp, and

state whether there was any conversation in your presence in reference to returning to the camp between W. B. Green and William Earnest Nutt or any others, and state what that conversation was.

A. Yes. There were two trucks and Mr. Green told the ones that wanted to go on the first truck to do so, or take the second truck later. I did not hear any direct conversation between Mr. Green and Mr. Nutt. Mr. Green addressed the group of employees as a whole and left it up to us as to which truck to take back to camp.

DID THE INJURY RESULTING IN DEATH ARISE OUT OF THE EMPLOYMENT?

Harold William Johnston, who was riding in the back end of the truck with his brother Ray and the deceased, testified, in part (R. 48, 49), as follows:

Q. Did you feel anything strike the car, or the car strike anything?

A. No. The road was so rough.

Q. What made the driver stop?

A. He said he noticed it, but being in the back and we weren't watching the road like the driver was.

Q. How fast do you think you were going?

A. Not over 20 miles an hour I would say. 20 or 25 at the most.

Q. Was the road rough?

A. Not in that particular spot.

Q. Did the accident happen on a curve or a straight of way?

A. We were just around the curve. There is a little straight stretch, about 200 yards.

Otto Berg, the driver of the truck, stated in his testimony (R 44):

Q. How did you know there had been an accident?

A. That's the thing. I stopped that truck because I knew something happened. There was a jolt or a bounce or whatever you want to describe it as. Something — what it was I don't know. Something had to call my attention that something had gone wrong. It was just like the truck made a jolt like it had run over a rock and that's what called my attention to stopping the truck and of course I stopped it right there. It flashed through and I wondered if something was wrong. I watch my road pretty close.

James F. Brown and Walter Welchell, riding in the seat of the truck with Berg, each testified that he felt a jolt or bump at the time of the accident (R. 27, 52).

In considering the question of compensability of injuries incurred by an employee while on his way to or from his work, it might be well to briefly re-

view that aspect of compensation law.

In the beginning, when compensation laws were first enacted, the courts strictly and literally construed the phrase "arising out of and in the course of employment" and no injury was considered compensable unless it arose during the actual working hours and while the employee was actually at work. The courts, however, were not long in recognizing that such a strict construction of the law did not tend to achieve the purpose and intent of compensation laws. Gradually the courts came to the conclusion that an employee might still be "employed" even though his physical or manual work had ceased for the time being or had not begun and that the mere fact that an injury befell the employee at a moment when he was not performing manual labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment.

The question of entitlement to compensation for injuries sustained outside the working hours arises most frequently where the employee is being transported to and from work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment. A brief review of recent cases involving that question

will indicate the circumstances and factors which the courts have considered important.

In the case of *Southern States Mfg. Co. v. Wright*, 200 So. 375 (Fla. 1941), the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the court said:

> "Generally it appears that the employer's liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work.
>
> " * * * So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there*, arranged for the transportation of the employee on the employer's truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such transportation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was an *incident to the employment and was exercised in the furtherance of the employment.*" (Italic supplied.)

In the case of *Taylor v. M. A. Gammino Construction Co.*, 18 Atl (2d) 400, 127 Conn. 528 (1941),

the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck in which to ride home. The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The court in affirming the award of compensation, said:

> "An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work;* to do this *it is not necessary that the employer should authorize the use of a particular means or method,* although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment,* particularly where it is of benefit to him in furthering that employment." (Italics supplied.)

In the case of *Chrysler v. Blue Arrow Transportation Lines,* 295 Mich. 606, 295 N. W. 331 (1940), the employee was engaged in driving a truck between Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the com-

pany. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured en route. The question was whether his injury was sustained in the course of his employment. The court, affirming the award to the employee, stated:

> "Solution of the problem in the present case is aided by the test suggested in the Knopka case, 'whether under the contract of employment, *construed in the light of all the attendant circumstances*, there is either an express or implied undertaking by the employer to provide the transportation.'
>
> "In the case before us there was a clear undertaking on the part of the employer to furnish weekend transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town. (Italics supplied.)

In the case of *Rubeo v. Arthur McMullen Co.*, 193 Atl, 797 (N.J. 1937), the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee was to be provided with transportation from his home to the site of the work, but it was clearly shown that

the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the court said:

> "When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delineation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, was *plainly within the contemplation of the parties*, at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would therefore be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction of the employer, into a practice *grounded in mutual convenience and advantage.* The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment.' *The requisite relation of master and servant continued during the journey: and the hazards thereof are therefore regarded as reasonably incident to the service bargained for.*" (Italics supplied.)

In the case of *Lamm v. Silver Falls Timber Co.*, 286 Pac. 527 (Oregon 1930), an employee of the lum-

ber company was injured while returning to camp from town where he had gone over the weekend. In deciding that the employee's injury came within the provisions of the workmen's compensation law the court said:

> "*From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ.* His work did not begin until the following morning; but his employment began when the defendant accepted the plaintiff into its employ some months previously.
>
> * * *
>
> "We come now to the more specific question whether the injury arose out of and in the course of the employment. This Court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of the employment, is not to be determined by the precepts of the common law governing the relationship between master and servant; these ancient rules include the principles defining negligence, as assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these facts seek to serve leave no room for narrow technical constructions. * * *
>
> "One of the purposes of the Workmen's Compen-

sation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. *Stark v. State Industrial Accident Commission*, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana Court in *Wirta v. North Butte Mining Co.*, 64 Mont. 279, 210 P. 332, 335, 30 A.L.R. 964; 'The word "employment" as used in the Workmen's Compensation Act does not have reference alone to actual manual or physical labor, *but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do.* * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee.'

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours.

* * *

"Since employment is construed in its popular

signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter.

* * *

"A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen's Compensation Acts is to grant compensation to an injured workman on account of his *status*. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. *When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation.* The courts which allowed the above recoveries ,and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words 'accident arising out of and in the course of his employment,' but bore in mind this general purpose of the act, as revealed by its entire text." (Italics supplied.)

In the case of *Ohmen v. Adams Bros.*, 109 Conn. 378, 146 Atl, 825, the court aptly indicated the conditions under which an employee is covered under the compensation law as follows:

"We have held that an injury to an employee is said to arise in the course of his employment at a place where he may reasonably be, and while he is fulfilling the duties of his employment, or

> engaged in doing something incidental to it, or something which he is permitted by the employer to do for their mutual convenience. * * *
>
> "We have also held: 'An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or of the conditions under which it is carried on.' "

In the instant case the employer furnished the employees with transportation to and from jobs that were not within walking distance. There was no means of transportation in the vicinity other than by the employer's trucks. The transportation of the men to and from the jobs was an incident of the employment. If employees are within the protection of the compensation act while they are being transported by their employer between their homes and the place of work before or after the regular working hours, then *a priori* they are protected while they are being transported to and from the various job sites in the course of the employment. The present case is within the purview of the compensation law for the reason that the accident occurred while the employee was being transported in his employer's truck from the place where he had performed work to the camp fur-

nished by the employer. The transportation was an *incident* (or even a necessity) *of the employment.* While riding the truck he was as much in the course of his employment as though performing his manual labor. Even if one reading the testimony should conclude that the employee in some manner (through joviality, carelessness or similar conduct) contributed to the fall through his own *fault, negligence,* or *contributory negligence,* the claim is not barred. The statute takes care of this.

Appellants would substitute their scientific conclusion as to the impossibility of the deceased falling out of the truck and landing as described for the findings of the deputy commissioner (Brf. 24). However, appellants in their analysis do not consider the effect of the truck motion in rounding a curve (R. 49) or the loss of his equilibrium by the deceased while standing in the bed of the truck. It is possible the road was smooth at the place where the deceased landed and yet there is substantial evidence that it was rutty and rough (R. 39, 48). Since appellants defend upon the testimony of Ray Johnston, the only eye-witness to the departure of the deceased from the truck, his viewpoint should be considered to determine whether his fall was accidental, wilful or solely because of intoxication.

Ray Johnston testified (R. 11) that he (Nutt) raised up a foot as if to step out; that he had just before (R. 12) pushed him back and said "These are rough roads. You'll fall out; and didn't think anything more of it." In answer to question as to any reason for deceased so acting (R. 12) Ray Johnston answered: "No. Any more than just joking."

Questioned by the Jury (R. 13) he answered: "I don't think he figured on letting his foot go down there that far."

Appellee submits that if there is an inference to be drawn from all the testimony it is not the conclusion reached by appellants of departure from course of employment due to intoxicated condition (R. 27), but that deceased was a well being, who had indulged in beer and was in a joking mood and in his pranks he was caught off balance by the motion of the truck in which he was standing and when he put his foot out to brace himself instead of touching the side of the bed his foot went over the 10-12 inch top.

However, it should be reiterated that even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be re-weighed.

Norton v. Warner Co., supra; *South Chicago Coal*

& Dock Co. v. Bassett, 309 U. S. 251; *Parker v. Motor Boat Sales*, 314 U. S. 244; *Liberty Mutual Ins. Co. v. Gray* (C.C.A. 9, 1943), 137 F. (2d) 926; *Lowe v. Central R. Co. of New Jersey* (C.C.A. 3, 1940) 113 F. (2d) 413; *Henderson v. Pate Stevedoring Co., Inc.* (C.C.A. 5, 1943), 134 F. (2d) 440.

Appellants contend that if deceased had remained seated instead of standing up, the accident would not have occurred. The statute seems to have answered this contention by setting up two defenses only: That injury (1) is due solely to intoxication; and (2) is due solely to the willful intention of the employe to injure or kill himself or another.

It will be noted the second ground was not urged and the first ground was not found. (Sec. 903 (b)).

The statute further fortifies the position of claimant in that "compensation shall be payable irrespective of fault as the cause for the injury." (Sec. 904 (b)).

Fault or contributory negligence or negligence have consistently been rejected as defenses to claims; otherwise the statute would not remedy as it was enacted to do, the assumptions of the common law doctrine.

See *Hartford Accident & Indemnity Co. v. Cardillo, supra.*

2. That Death of Employee was not Occasioned Solely by his Intoxication.

The deputy commissioner found "that deceased was in a happy state of intoxication." He perhaps qualified his statement because reference to the testimony will show that no witness testified that deceased was intoxicated at the time of the accident. To say that the accident was due solely to intoxication is to say if deceased had been sober it could not have happened.

Appellants would attempt to argue that the "outrageous manner" in which the deceased acted was solely due to intoxication, and the riding in a bouncing truck over a rough crooked road could not be considered in any sense a related cause because others who were equally intoxicated, according to the testimony (R. 28, 40, 43, 48,), remained seated and were uninjured, and, therefore, his death was caused by his own careless conduct.

As appellee has heretofore pointed out, this conclusion was not justified by the testimony of Ray Johnston, or any other person, nor by the disclosed life and habits of the deceased. Furthermore, in view

of the presumption (38 U.S.C.A. Sec. 920 (c)) the burden was upon the employer and carrier to establish that decedent's death was occasioned solely by his intoxication.

The courts have uniformly affirmed a finding of the trier of the facts that the injury did not result solely from the intoxication of the employee where other contributing factors existed.

Department of Taxation & Finance v. De Parma, 3 N.Y.S. (2d) 120; *Southern Can Co. v. Sachs*, 131 Atl. 760; *Hahneman Hospital v. Industrial Board of Illinois*, 118 N.E. 767; *Griffiths & Sprague Stevedoring Co. v. Marshall*, 56 F. (2d) 665; *Maryland Casualty Co. v. Cardillo*, (App. D.C., 1939), 107 F. (2d) 959.

The Supreme Court of Arkansas, in *Elm Springs Canning Co. v. Sullins*, 180 S.W. (2d), 113, 116, a case also involving intoxication and falling from a truck under circumstances that in a fair and impartial mind would remain in doubt, gave the deceased the benefit of the doubt, in the following words:

> "To assume that his intoxication was the sole cause of his falling from the truck and resultant death would be a presumption in the teeth of a statutory presumption to the contrary."

Monahan, 61 F. Supp. 647; *Wilson & Co. v. Locke, supra; Calabrese v. Locke, 56 F.* (2d) 458; *Southern S. S. Co. v. Norton* (C.C.A. 3, 1939), 101 F. (2d) 825; *Groom v. Cardillo* (App. D.C. 1941), 119 F. (2d) 697; *Case v. Pillsbury* (C.C.A. 9, 1945), 148 F. (2d), 392; *Contractors v. Pillsbury* (C.C.A. 9, 1945), 150 F. (2d), 310; *Contractors v. Marshall* (C.C.A. 9, 1945), 151 F. (2d), 1007; *Crowell v. Benson*, 285 (U. S. 22; *South Chicago Coal & Dock Co. v. Bassett, supra; Parker v. Motor Boat Sales, supra; Norton v. Warner Co., supra.*

The motion to dismiss raises only a question of law, and neither the statute nor any rule of admiralty procedure requires that the court make and enter findings to support the order of affirmance granting the motion.

CONCLUSION

For the foregoing reasons it is appellee's contention the decision below should be affirmed.

Respectfully submitted,

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